Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-477

AD HOC '78, T. MILTON STREET,
Petitioners,

v.

ROUSE PHILADELPHIA INC.; REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA; GIMBEL BROTHERS, INC.; and the GIMBEL BROTHERS REALTY CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

BRIEF OF RESPONDENT ROUSE PHILADELPHIA INC. IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED

A. Is a decision of an intermediate state appellate court upholding the issuance of a preliminary injunction a "final judgment" such as to permit review by this Court, where Petitioners have not sought a final hearing, although entitled to such within three days upon demand, and where under state law the appellate courts apply a less rigorous standard in sustaining preliminary injunctions than in the case of permanent injunctions?

B. Should the Court review the decision of an intermediate state appellate court upholding the issuance of a preliminary injunction where the decision of the intermediate appellate court is in full accord with the applicable decisions of this Court?

II. BRIEF STATEMENT OF THE FACTS

On August 25, 1978, Petitioner, T. Milton Street, and a large group of persons estimated to be from three to five thousand strong, massed at various locations in and around the entrances to The Gallery, a downtown shopping mall in Center City Philadelphia which consists of approximately ninety-four privately owned businesses. They also converged on Gimbels Department Store located in the same area. Ingress and egress to both The Gallery and Gimbels was rendered difficult and, at times, impossible, by the group's activities. Street and three to five hundred of the demonstrators then entered The Gallery and marched throughout the mall shouting in loud voices and bringing business therein to a virtual standstill. Petitioner Street spoke to the throng with the aid of sound amplification equipment and urged a boycott of the businesses in the mall. (Findings of Fact 47-49, A. 85-A. 87; Superior Court Opinion, A. 2-A. 3).

At the *commencement* of Petitioners' activities "[t] here was no actual violence or threats of violence or destruction of property" (A. 30). However, "the conduct of the demonstrators was strident, angry and militant such as to convey apprehension that violence and mob action might occur", and as a result, the affected businesses were virtually closed. (Finding of Fact 49, A. 87).

The initial judicial response to Petitioners' conduct upon Respondents' motion was the entry of an order on August 26, 1978, which, *inter alia*, limited the number of pickets which Petitioners could employ to effectuate the boycott and placed restrictions on the conduct of such pickets (Finding of Fact 50, A. 87).

Commencing on September 6, 1978, and continuing episodically through October 26, 1978, the trial court heard testimony on Respondents' motion for a preliminary injunction. During the course of the hearing, Petitioners constantly engaged in conduct that the trial court found to be "improper, unlawful and in violation of [the] court's injunction Orders (Finding of Fact 52, A.88).[1] This conduct which included

[1] Although not set forth herein, ten pages of the trial court's findings of fact describing such conduct are replete with instances of outrageous and, at times, violent conduct (A. 86-A. 95). *See also* Superior Court Opinion, (A. 6-A. 7).

criminal acts of arson and extortion as well as various tortious acts, caused the trial court to enter several modifications of its August 26 order, which further restricted the Petitioners' activities with respect to the boycott.

On January 31, 1979, the trial court filed extensive findings of fact, conclusions of law and a written opinion. Concluding that both the manner of Petitioners' conduct and the purpose of their conduct were unlawful, the trial court entered a preliminary injunction order which modified and amended those temporary and special injunction orders previously entered. This preliminary injunction order enjoined Petitioners from "picketing, handbilling, speechmaking, demonstrating and boycotting inside or outside The Gallery or Gimbels . . ." (A. 67). The trial court defined the area from which Petitioners were enjoined from engaging in such activities as "the public areas [in The Gallery or Gimbels] or any of the three colonnades located outside the entrance to Gimbels, or the exterior courtyard area, or the sidewalk which forms the immediate perimeter surrounding The Gallery, Gimbels and Strawbridge stores." (A. 67) The issuance of this preliminary injunction decree was unanimously affirmed by the Superior Court[2] and a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was denied. (The vote of two of the seven Justices of the Court is necessary for such a petition to be granted.)

Notwithstanding the provisions of Rule 1531 (f) (1) of the Pennsylvania Rules of Civil Procedure,[3] Petitioners have elected *not* to make a demand for immediate final hearing.

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[2] In addition to the sustention of the January 31, 1979 preliminary injunction decree, Petitioners seek review in this Court of a February 28, 1979 order of the trial court. No opinion in support of this order was filed by the trial court, and the Opinion of the Superior Court does not address this later order.

[3] This Rule provides that: "When a preliminary or special injunction involving freedom of expression is issued, either without notice or after notice and hearing, the court shall hold a final hearing within three (3) days after demand by the defendant."

III. ARGUMENT

A. The decision of the Superior Court of Pennsylvania sustaining the issuance of a preliminary injunction is not a reviewable "final judgment".

Pursuant to the provisions of 28 U.S.C. § 1257 (3):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Petitioner's claim entitlement to seek review by this Court with the talismanic incantation that "this case involves the First Amendment to the United States Constitution" (Petition for Writ of Certiorari, at p. 1). Due to the procedural posture of the case, this federal issue is not ripe for review, and the judgment of the Superior Court is not a "final order" subject to review by this Court.

The judgment of the Superior Court merely sustained the issuance of a preliminary injunction upon the facts found by the trial court. The standards which must be satisfied under Pennsylvania law before a preliminary injunction may be issued are: 1) its issuance is necessary to prevent immediate and irreparable harm; 2) greater injury would result by refusing the preliminary injunction than by granting it; and 3) until a final determination can be made, the decree properly restores the parties to their status as it existed immediately prior to the alleged wrongful conduct. *Alabama Binder & Chemical Corp.* v. *Pennsylvania Industrial Chemical Corp.*, 410 Pa. 214, 189 A.2d 180 (1963); Trial Court Opinion, (A. 63-A.64). In recognition of the substantially less

rigorous standards for issuance of a preliminary injunction than those required for a permanent injunction, and the importance of First Amendment rights, the Supreme Court of Pennsylvania has provided in Rule 1531(f) (1) that:

> When a preliminary or special injunction involving freedom of expression is issued, either without notice or after notice and hearing, the court shall hold a final hearing within three (3) days after demand by the defendant. A final decree shall be filed in the office of the prothonotary within twenty-four (24) hours after the close of the hearing. If the final hearing is not held within the three (3) day period, or if the final decree is not filed within twenty-four (24) hours after the close of the hearing, the injunction shall be deemed dissolved.

The official note to this Rule recognizes that the three day period is the maximum permissible time and that in particular cases, a shorter period may be required. Petitioners have not availed themselves of the procedural safeguards of Rule 1531. Respondents who are not armed with the procedural mechanism to trigger an immediate final hearing have taken all necessary procedural steps to bring this case to final disposition in the trial court.

The standard of appellate review of the issuance of a preliminary injunction is extremely limited under Pennsylvania law. A trial court has broad discretion in deciding whether to grant or refuse a preliminary injunction. Accordingly, an appellate court will not decide the merits of the case on an appeal from an order granting or denying a preliminary injunction but will only consider whether any apparently reasonable grounds existed for the action of the trial court. *Pennsylvania Securities Comm'n* v. *Continental Mfg. Co.*, 465 Pa. 411, 350 A.2d 831 (1976); *Roberts* v. *Board of Directors*, 462 Pa. 464, 341 A.2d 475 (1975). Only if it is plain that no grounds exist to support a preliminary injunction or that the principle of law relied upon was palpably erroneous or misapplied will an appellate court interfere with the decision of a court of equity granting a request for temporary

injunctive relief. *Roberts* v. *Board of Directors, supra; Wolf* v. *Baltimore*, 250 Pa. Super 230, 378 A. 2d 911 (1977).

The substantive merits of the federal issue raised by Petitioners were not before the Superior Court, and accordingly that Court's *judgment*,[4] of which Petitioners seek review by this Court, did not, as a matter of state law, adjudicate the substantive merits of the federal issue.

Because the appellate courts of Pennsylvania have *not* by any means finally determined the federal issue present in this case, review of this case cannot be predicated upon the liberal interpretation of the final judgment rule which would permit review of state appellate court decisions by this Court even where there are further proceedings in the lower state courts to come. *See, e.g., Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 477-485 (1975). Moreover, this case does not fall within the four categories of cases discussed in *Cox Broadcasting*.

The first category of such cases is obviously not apposite, for the reasons set forth above, because it deals with those cases wherein the further proceedings in the lower court are preordained by the final judgment on the federal issue by the state appellate court. 420 U.S. at 479. The second category of cases consists of those "in which the federal issue, finally decided by the highest court in the state, will survive and require decision regardless of the outcome of future state-court proceedings." 420 U.S. at 486. In the instant case, the requirement for appellate review of the federal issue is totally *dependent* on the outcome of the future trial proceedings.

In the third category are those situations in which the federal claim has been finally decided, with further proceed-

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[4] The Superior Court *opinion* deals only with the appeal from the trial court order holding Petitioner Street in civil contempt of court. (A.2) In upholding the contempt order, the Superior Court, in a well-reasoned portion of its opinion, also discussed the substantive merit of the January 31 preliminary injunction order. Even in the context of the contempt order, however, the discussion of the substantive merits of the preliminary injunction order was *dicta* because as the Superior Court held: "Parties must obey a preliminary injunction, even if invalid, if the order is entered by a Court with jurisdiction over the subject matter of the order and the parties thereto unless the order is vacated or reversed." (A.15)

ings on the merits in the state courts to come, but where later review of the federal issue cannot be had, whatever the ultimate outcome of the case. 420 U.S. at 481. Such a result is not possible in the case *sub judice*. The only situation in which review of the federal issue would be precluded would be the situation where the federal issue is resolved in favor of Petitioners.

The final category of cases in which this Court has permitted review despite the pendency of further state proceedings includes those in which "reversal of the state court on the federal issue would be preclusive of any further litigation" and "a refusal immediately to review the state court decision might seriously erode federal policy." 420 U.S. at 482-483. Here, even a resolution of the federal questions as framed by Petitioners would not preclude further state proceedings. Secondly, no federal policy will be eroded by the denial of the Petition for a Writ of Certiorari and Petitioners have not suggested to the contrary.

Petitioners have made reference in their Jurisdictional Statement to *Organization For a Better Austin* v. *Keefe*, 402 U.S. 415 (1971). In *Keefe* this Court, noting that the injunction involved was termed a "temporary" injunction by the Illinois courts, considered whether it could properly decide the case pursuant to 28 U.S.C. §1257. Observing that the record was not such as to leave the matter entirely free from doubt, this Court concluded that it was not without power to decide the case reasoning as follows:

> We see nothing in the record that would indicate that the Illinois courts applied a less rigorous standard in issuing and sustaining this injunction than they would with any permanent injunction in the case. Nor is there any indication that the injunction rests on a disputed question of fact that might be resolved differently upon further hearing. Indeed, our reading of the record leads to the conclusion that the issuance of a permanent injunction upon termination of these proceedings will be little more than a formality. Moreover, the temporary injunction here, which has been in effect for over three years,

> has already had marked impact on petitioners' First Amendment rights.

402 U.S. at 418, n.*.

The doubts which the Court resolved in favor of jurisdiction in *Keefe* should be resolved against the assumption of jurisdiction here because the enunciated predicates for that decision are not present. The record in this case demonstrates that the Pennsylvania courts *do* apply a less rigorous standard in issuing and sustaining preliminary injunctions than in the case of permanent injunctions. *See* discussion at pages 4 and 5, *supra*. The record amply demonstrates that the January 31 preliminary injunction order culminated a series of progressively more restrictive temporary injunction orders which were necessitated by Petitioners' continued conduct which was not only unlawful and violent but contumacious. The record which will be established at the final hearing in state court will demonstrate the absence of such conduct since February 23, 1979. Accordingly, it would not be appropriate to conclude that the issuance of a permanent injunction in the same terms as that required temporarily in January and February of 1979 would be a "mere formality".

Finally, although the preliminary injunction has been in effect for almost 21 months, Petitioners have always had it exclusively within their power to cause the *preliminary* injunction to be substantively addressed by the trial court within at least three days of their demand.[5] Because Petitioners have elected not to exercise this right, a fair inference can be drawn that the impact of the preliminary injunction upon Petitioners' First Amendment rights has not been substantial.

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[5] Because of the procedural safeguards provided by Rule 1531 (f) (1) of the Pennsylvania Rules of Civil Procedure in the case of preliminary injunctions affecting freedom of expression, the rationale upon which jurisdiction was predicated in National Socialist Party v. Skokie, 432 U.S. 43 (1977) provides no support for Petitioners' jurisdictional claim in this case.

B. The decision of the Superior Court raises no important and novel questions which have not been previously addressed by this Court and those decisions were followed by the Superior Court.

Although not included within the Superior Court judgment sustaining the issuance of the preliminary injunction, the Superior Court, in *dicta*, did discuss the substantive merit of the federal issue in its opinion upholding the finding of civil conduct. The Superior Court opined that the preliminary injunction order prohibiting certain activity by Petitioners in a specific area was properly entered where the trial court had entered findings of fact that the purpose of Petitioners' picketing and boycott activities was to "injure or destroy The Gallery," businesses with which Petitioners had no dispute (A.99-A.100), and that the manner of these activities was infected by serious acts of misconduct and lawlessness (A.90). The questions presented for review as styled by Petitioners completely disregard these most basic and dispositive findings of fact which are of course not subject to review by this Court. Petitioners' characterization of the questions inaccurately reflects the issues which would be presented if the substantive merits of the federal issue were ripe for review. Petitioners' deceptively styled questions for review avoid the dispositive facts of record. Accordingly, even this Court's resolution of the questions presented by Petitioners in their favor would not advance the resolution of this litigation because of Petitioners' noncompliance with Rule 21.1(a) by failing to express the questions presented for review in the terms and circumstances of the case.

The substantive issues which would be presented had the Superior Court upheld a permanent injunction are not novel and have been heretofore determined by this Court. *See, e.g., American Radio Association* v. *Mobile Steamship Association*, 419 U.S. 215 (1974); *International Brotherhood of Teamsters, Local 695* v. *Vogt*, 354 U.S. 284 (1957); *Hughes* v. *Superior Court*, 339 U.S. 460 (1950); *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490 (1949). The opinion of the Superior Court is in full accord with this precedent.

C. The decision of the Superior Court was engendered by events most unlikely to recur and the present impact of the judicial response to those events of two years ago is apparently of such slight degree that Petitioners have eschewed their rights under state law to demand an immediate final hearing.

The facts of this case wherein a group of individuals have chosen to injure and destroy completely innocent businesses which have no ability to cause the accomplishment of the putative objectives of that group; wherein those businesses are victimized by unlawful, violent and criminal acts; and wherein the judicial attempts to regulate that group's conduct are met with enunciations of intent not to abide by the trial court's orders and the continued contumacious disobedience of those orders, are most unlikely to recur. This Court's review of this case even if it could resolve this litigation, would not provide precedent of broad applicability. Denial of the Petition For Writ of Certiorari, rather than finally closing the courthouse doors on Petitioners, would open the state courthouse doors for final judicial response to Respondents' request for permanent injunctive relief, to be addressed in the context of the record as presented at the final hearing. Such a result is not unduly harsh to Petitioners who have spurned the procedural device which could have occasioned such a hearing by February 3, 1979 and who appear to be more concerned with theoretical legal arguments *in vacuo* than the actuality of judicial restrictions on their freedom of expression.

IV. CONCLUSION

For all of the foregoing reasons, Respondent Rouse Philadelphia Inc. respectfully submits that the Petition For Writ of Certiorari should be denied.

Respectfully submitted,

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